

HIGH COURT OF AZAD JAMMU AND KASHMIR

Crim. Misc. Petition No.294/2025.
Date of Institution. 18.07.2025.
Date of decision 24.07.2025.

Abdul Ghaffar S/o Muhammad Ramzan Qureshi R/o Mohallah
Qurashian P/o Gulpur Barali Tehsil & District Kotli, Azad Jammu
and Kashmir.

(Accused/Applicant)

Versus

1. State through Advocate General Azad Jammu and Kashmir,
Muzaffarabad.
2. Station House Officer Police Station Civil Secretariat
Muzafarabad, District Muzaffarabad, Azad Jammu and
Kashmir.

(Non-applicants)

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PRE-ARREST BAIL APPLICATIONS/ANTICIPATORY BAIL

Before:- ***Justice Syed Shahid Bahar, J.***

PRESENT:

M/s Waqar Farooq Abbasi and Syed Kashan Ali Bukhari, Advocates for the applicant/petitioner.

Syed Faisal Gillani, Asst. A.G for the State.

ORDER:

Through 02 separate applications in hand, the applicant, a civil servant, prayed for anticipatory bail in 2 different FIRs chalked out in Police Station Saddar & Police Station Civil Secretariat i.e. FIR No.111/2025 and 178/2025 in offences under Sections 10/18 and 10(3) of the Offence of Zina (Enforcement of Hudood) Act, 1985 (ZHA).

2. The Court granted the applicant 'ad-interim bail', directing notice to the State for a hearing to determine 'confirmation' or 'rejection' of the instant bail applications.

3. This Court, besides a criminal Court in view of Section 6, Cr.P.C. is also a Constitutional Court, thus is equipped with powers unlike subordinate/inferior Criminal Courts. High Court can pass appropriate order to protect the fundamental rights of a person with respect to life or liberty, which does include to grant or decline pre-arrest bail. I am inclined to dispose of the matter of anticipatory bail myself instead of letting the matter to be decided by the District Court of Criminal Jurisdiction.

4. Messrs Waqar Farooq Abbasi and Syed Kashan Ali Bukhari, learned counsel for the petitioner vehemently contended that their client is being dragged into the matter due to malafide intentions, he is

neither nominated in the FIR nor has any remote nexus with the allegations leveled in the FIR. Counsel for the petitioner further contended that their client is a respected officer and PSC topper and in case of arrest, he will suffer irreparable loss and arrest will damage his name and fame. He placed reliance on the following case laws:

- i. 2009 P.Cr.L.J 1334.
- ii. 2008 SCMR 980.
- iii. 1999 P.Cr.L.J Lah 86.
- iv. 2008 MLD SC 364.

5. While on the other hand, by controverting the arguments advanced by the petitioner, the learned Assistant Advocate General, Faisal Gillani, opposed the bail application and prayed for rejection of the applications. He submitted that the principal accused during investigation disclosed the name of the petitioner and place of occurrence, shelter home was in joint possession and rent of the same was also being paid by the applicant as well. He further contended that corpus of the applicant is required for prompt and thorough investigation, name of the applicant is appearing in column No.2 of Challan No.75/25, as per record, the alleged premises of the house were utilized as a brothel by Arif Butt accused, as well as by the applicant.

6. Arguments heard, record perused.

7. Applicant calls the accusation downright false and malafide. As per the record, it is a delicate matter, so how could it be assumed that he is out of the loop? At the threshold of inquiry, keeping in view the rampant crime of sexual harassment while deciding the

matter qua pre-arrest bail, the Court dealing with the matter is required to take into consideration the infra factors: i.e.,

- (i) The nature of offence, and its overall impact upon society;
- (ii) Tentative assessment of allegation of malafide; and
- (iii) Degree of imminent danger/threat and conduct of the applicant and his involvement.

What is Bail? A. Bail: An Incisive Glimpse

i. Literal Meaning:

8. The word “bail” comes from the old French word “bailier”, which means “to hand over” or “to deliver”. In its original sense, it referred to the act of delivering a prisoner into the custody of sureties who would be responsible for his/her appearance in Court. It evolved to include the security given for such appearance.¹

9. Bail is a mechanism that allows a person accused of a crime to be released from police or judicial custody before trial, upon providing a guarantee (known as bail bond) that he/she will appear in Court whenever required². The primary purpose of bail is to secure the attendance of the accused in Court to stand trial and prevent his/her flight from justice³. If the accused fails to appear, the bail amount can be forfeited.⁴

B. Types of Bail

¹. Oxford English Dictionary.

². Section 499 of the Code of Criminal Procedure, 1898 (Cr.P.C).

³. Gudikanti Narasimhulu vs. Public Prosecutor, High Court of Andhra Pradesh (AIR 1977 SC 429).

⁴. Section 514 of the Cr.P.C.

10. In AJ&K, as in numerous commonwealth jurisdiction, bail is broadly categorized based on the stage of the legal process: i.e.

*i. **Post-Arrest Bail (Regular Bail):***

11. This is the most common type, sought after an individual has been arrested and is in custody. The Court, while granting or refusing bail, considers factors such as the nature and gravity of the offence, the strength of evidence, likelihood of abscondence, tampering with evidence/witnesses and previous criminal record⁵. In AJ&K, this is primarily dealt with under Sections 496 and 497 of the Code of Criminal Procedure, 1898 (Cr.P.C).⁶

*ii. **Pre-Arrest Bail (Anticipatory Bail):***

12. This is a unique provision allowing a person to seek bail in anticipation of an arrest for a non-bailable offence. Both High Court and Sessions Court have concurrent jurisdiction to grant pre-arrest bail under Section 498, Cr.P.C. Pre-arrest bail is an exceptional relief which is to be granted only where there is a clear demonstration of mala-fide⁷ so as to protect innocent person against victimization through abuse of law for ulterior motives⁸.

C. History of Pre-Arrest Bail

⁵. Gurucharan Singh v. State (AIR 1978 SC 179).

⁶. Bail in 'bailable offences' is granted under section 496, Cr.P.C whereas in non-bailable offences; it is granted under Section 497, Cr.P.C. The terms bailable offence and non-bailable offence are defined in section 4(b), Cr.P.C. Bail in 'bailable offence' is granted as a matter of right to the accused whereas in non-bailable offence, bail is not granted as a matter of right but as matter of 'discretion'. See Tariq Bashir v. The State (PLD 1995 SC 34).

⁷. Kamran Ataullah v. The State (2021 SCMR 449)

⁸. Azhar Ullah v. State (2025 YLR 402).

13. The concept of anticipatory bail is a relatively modern development in common law criminal procedure, primarily originating and evolving in the subcontinent.

a. Origin in Pakistan:

14. Unlike many other bail provisions, anticipatory bail was not initially an explicit part of the Code of Criminal Procedure, 1898 (Cr.P.C) as enacted by the British. The power to grant pre-arrest bail was largely developed through judicial interpretation particularly by the Lahore High Court in the case of *Hidayat Ullah Khan v. The Crown*⁹ which is considered as a foundational judgment in recognizing the inherent power of the High Court to grant pre-arrest bail. The reasoning was that if the High Court had the power to grant bail after arrest, it implicitly had the power to grant it before arrest to prevent an unjust detention.

b. Evolution in India:

15. While initially based on judicial interpretation of Section 498, Cr.P.C India later formally codified anticipatory bail. The Law Commission of India, in its 41st report (1969), recognized the need for such a provision to protect innocent persons from false accusations and harassment. It recommended its inclusion. Consequently, Section 438 was specifically inserted into the Indian Cr.P.C, expressly providing for

⁹. PLD 1949 Lahore 21; authored by renowned jurist A.R. Cornelius.

anticipatory bail. This made it a statutory right/remedy rather than solely a product of judicial interpretation¹⁰.

c. Evolution in Pakistan:

16. Unlike India, Pakistan did not introduce a separate statutory section for anticipatory bail¹¹. Instead, the practice of pre-arrest bail continues to operate under the general powers of the High Court and the Court of Sessions under Section 498 of the Cr.P.C, 1898.

D. Purpose

17. The core purpose of pre-arrest bail is to prevent the misuse of the power of arrest and to protect individuals from undue harassment and humiliation before a proper investigation or trial can establish accused's guilt. Key purposes include:

i. Protection against false implication and harassment:

18. The primary objective is to safeguard the liberty and dignity of individuals who have reasons to believe they might be arrested on false, frivolous or politically motivated charges or due to malafide intentions of the complainant or police¹².

ii. Prevention of Dignity and Reputation:

¹⁰. See; Gurbaksh Sing Sibbia v. State of Punjab [(1980) 2 SCC 565] and Sushila Aggarwal v. State [(2020) 5 SCC 1].

¹¹. Like Section 438 of Indian Cr.P.C.

¹². Rana Muhammad Arshad v. Muhammad Rafique (PLD 2009 SC 427).

19. An arrest, even if later found to be unwarranted, carries a significant social stigma and can cause immense humiliation and damage to a person's reputation. Pre-arrest bail acts as a shield against such irreparable harm. In *Gurbaksh Singh Sibbia v. State of Punjab*¹³, it was observed:

“The fear of arrest by an unscrupulous prosecutor or a false accuser may be the motivation for the application for anticipatory bail.”

iii. Prevention of Pre-trial punishment:

20. Detention, even for a short period, can be a form of punishment. Pre-arrest bail ensures that an individual's liberty is not curtailed unnecessarily before there is sufficient evidence to justify accused's detention for investigation or trial¹⁴.

iv. Facilitating Cooperation with Investigation:

21. Often, courts grant anticipatory bail with conditions that require the applicant to cooperate with the investigation, appear before the police when required, and not tamper with evidence or witnesses. This allows the investigation to proceed while preserving the individual's freedom.¹⁵

v. Check on Police:

22. It acts as a judicial check on the arbitrary exercise of the power of arrest by Law Enforcement Agencies (LEAs) compelling them

¹³. [(1980) 2 SCC 565].

¹⁴. Prison Policy Initiative; Research roundup: Evidence that a single day in jail causes immediate and long-lasting harms by Brian Nam-Sonestein.

¹⁵. See; *Arnesh Kumar v. State of Bihar* [(2014) 8 SCC 273].

to have “reasonable grounds” before depriving a person of their liberty because liberty is not the gift of the State, it is a fundamental right of an individual¹⁶.

23. Anticipatory bail is indeed a ‘safety valve’ for personal liberty but having said that, it must not be granted in cases involving heinous crimes unless there is a substantial evidence of false implication¹⁷.

24. The power of the High Court and Court of Sessions to grant pre-arrest bail, first and foremost, must be examined in constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose¹⁸ for making arrest of the accused in a case by the investigating officer would, as a corollary be a ground for admitting the accused to pre-arrest bail and vice versa.¹⁹

25. Be that as it may, the general principle is bail, not jail²⁰, however, this principle is not absolute. This is because pre-arrest bail is an extra-ordinary relief which is to be extended in rare and exceptional circumstances to the accused.²¹ Undeniably, the right to liberty is a

¹⁶. Siddharam Satlingappa Mhetre v. State of Maharashtra [(2011) 1 SCC 694].

¹⁷. Balchand Jain v. State of Madhya Pradesh [(1976) 4 SCC 572].

¹⁸. Pre-trial detention should be the exception reserved only for situations where the likelihood exists that the accused would abscond, destroy evidence, influence witnesses, avoid investigation, flee from the jurisdiction of the State or is likely to repeat the crime due to his past record.—Bail and Liberty – by Reema Omar, The Dawn, 22.06.2019.

¹⁹. Malik Muhammad Aslam v. State (2014 SCMR 1349).

²⁰. Muhammad Tanveer v. State (PLD 2017 SC 733).

²¹. Usama Bin Tahir Anwar v. State (2023 P.Cr.LJ 517).

fundamental constitutional guarantee, nevertheless when an individual is accused of heinous offences i.e. permitting an unlawful use of property in particular et al, the Courts must exercise their extraordinary discretionary powers with heightened vigilance and circumspection. This is imperative because pre-arrest bail is not an absolute right but an exceptional remedy, and its grant in such sensitive matters requires a meticulous balancing of the accused's fundamental right to liberty against the paramount public interest in preventing heinous crimes, ensuring the integrity of the investigative process and safeguarding the victims well-being and dignity.

26. In *Javed Iqbal v. The State*²², Supreme Court of Pakistan laid down a ratio decidendi that in pre-arrest bail matters, merits of the case can be touched upon, hence after taking stock of the contents of the record permitting an unlawful use of property that too, against women etc. who, unfortunately are already vulnerable in patriarchal society, the exercise of discretion for granting pre-arrest bail to the accused becomes exceptionally restricted. This heightened judicial scrutiny is necessitated by the profound severity of such offences, which inflict not only deep and indelible psychological harm upon the victim but also pose a significant threat to societal morality and order.

27. Trite that pre-arrest bail is not a routine entitlement. Given the heinous nature of the alleged acts and their far-reaching detrimental impact on society at large, the accused in the matter at hand does not merit the concession of this exceptional relief,

²². 2022 SCMR 1424.

particularly where reasonable grounds for belief in the commission of such grave, non-bailable offences are discernable from the initial record, negating claims of *arriere-pensee*,²³ malafide or further inquiry into innocence.

28. Case laws referred by the learned counsel for the applicant are distinguishable to the facts of instant case.

29. The epitome of the above discussion is that the instant applications seeking pre-arrest bail are hereby **rejected**.

30. It is imperative to note that the observations herein are solely tentative, intended merely for the purpose of the instant bail applications, and shall in no way prejudice the accused's fundamental rights, including the right to a fair trial.

Muzaffarabad,
24.07.2025.

VACATION JUDGE

Approved for reporting

VACATION JUDGE

²³. "Arriere-Pensee" is a French term which means "ulterior motive"